

LRC Study Committee

Property Owner Protection and Rights

March 3, 2014

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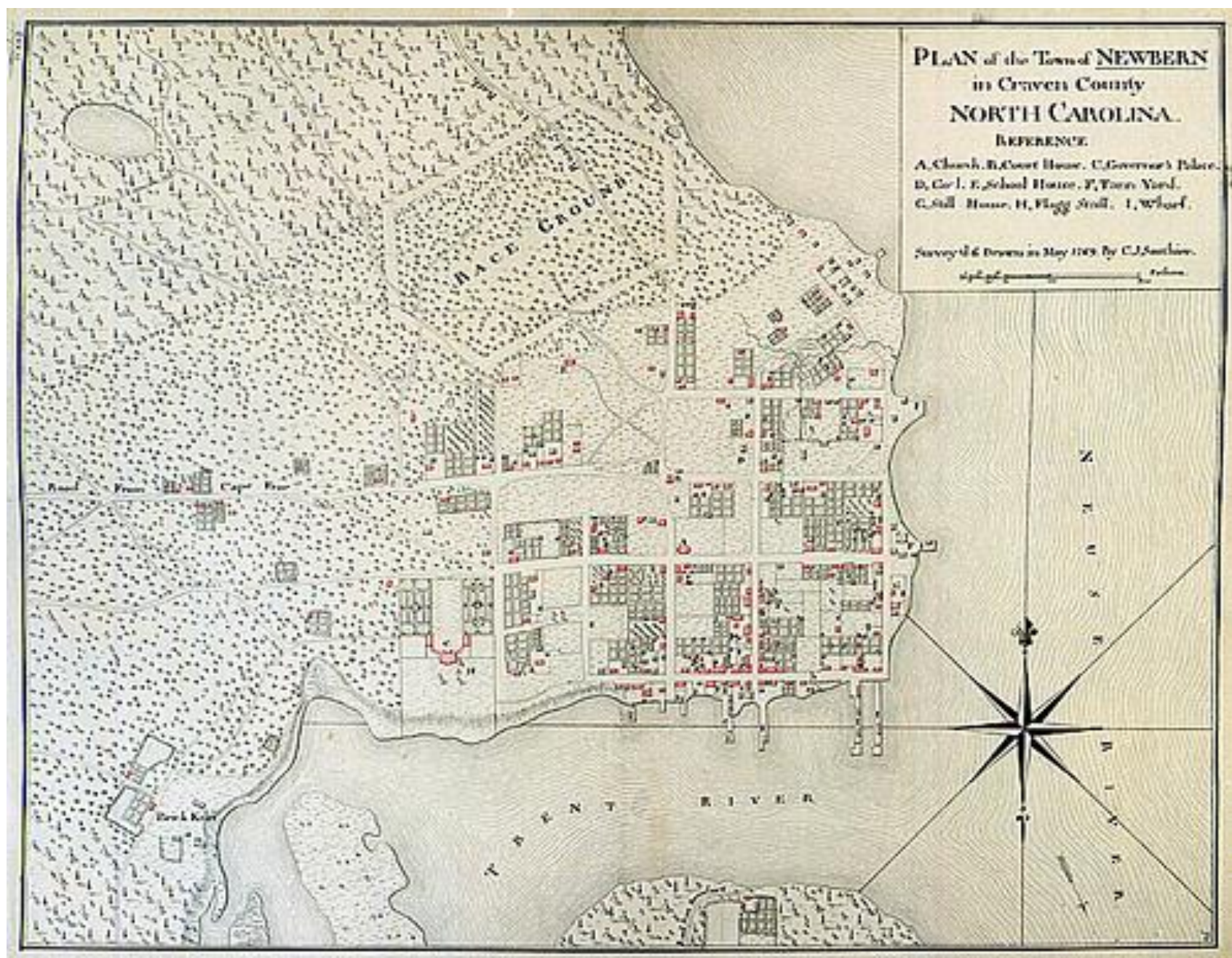
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Outline

1. Authority for Land Use Regulation (Owens)
2. Vested Rights (Lovelady)
3. Exactions (Ducker)
4. Extraterritorial Jurisdiction (Ducker)
5. Appearance Standards (Lovelady)
6. Attorney Fees (Owens)

1. Authority to Enact and Enforce Land Use Regulation



New Bern, 1769

Local Government Authority

- No inherent authority
- No constitutional or statutory home rule
- Only the authority granted by General Assembly
- Grants can be express or implied

Express Authority

- 1) General police power – regulations to protect public health, safety, welfare
- 2) Specific development regulations

Most Common Development Ordinances

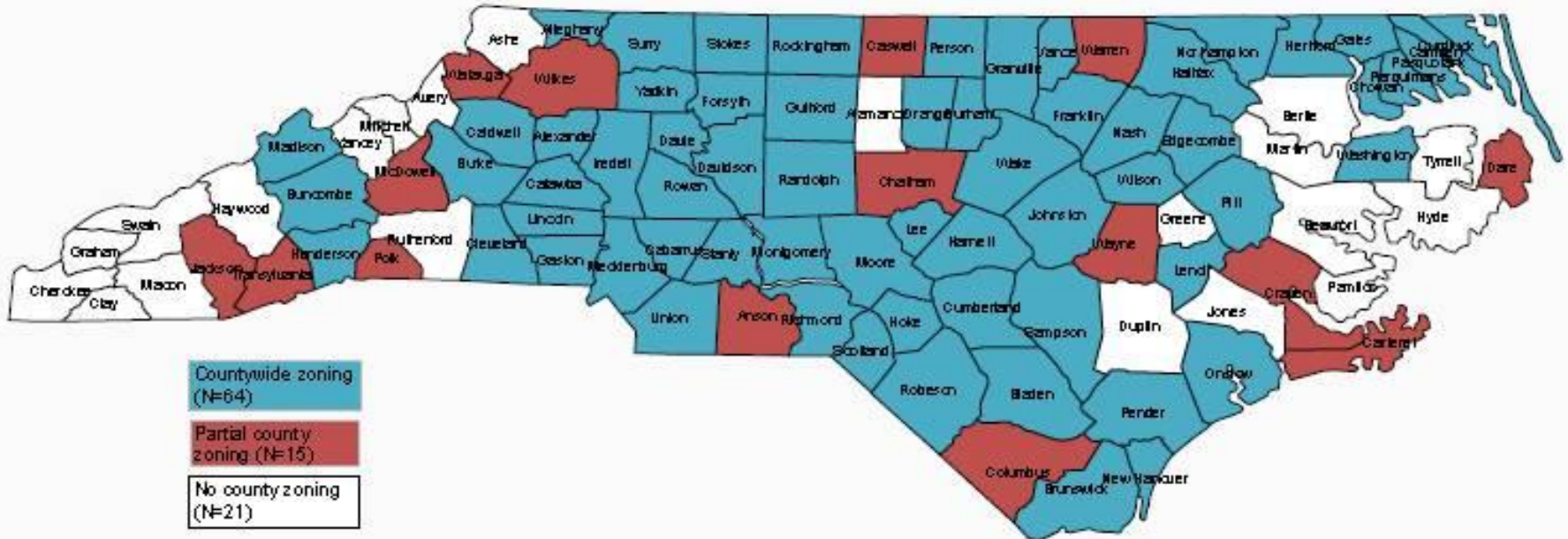
- Zoning – land uses, development standards
- Subdivision – lot layout, infrastructure
- Building inspection – state sets construction standards, local governments issue permits and enforce
- Housing code – habitability

Municipal Zoning

Municipality Population	% with Zoning
1 - 999	71%
1,000 - 4,999	96%
5,000 – 9,999	100%
10,000 or more	100%

2012 SOG Survey
% of responding jurisdictions

County Zoning



School of Government
The University of North Carolina at Chapel Hill
February 2012

Other Development Ordinances

- Sedimentation and erosion control
- Mobile home parks
- Signs
- Landscaping
- Adult business siting
- Telecommunication towers
- Unified development ordinance
(combines various specific ordinances
into one ordinance)

Implied Authority

- Prior to 1971: Dillon's Rule for strict construction
 - 1) Expressly granted
 - 2) Necessarily implied or incidental
 - 3) Essential to declared objectives
- 1971 statute on broad construction
 - Grants include “additional and supplementary powers . . . reasonably necessary or expedient”

Limits to Broad Construction

- Not applicable where plain meaning of express grant is clear -- if no ambiguity in statute, no construction required
 - If tax or fee involved, strict judicial construction
 - Cases apply rule to find no implied authority for school impact fees, even if voluntary

Limits to Broad Construction

- Cannot be inconsistent with plain meaning
- Ambiguity resolved in favor of landowner and free use of property

Process for Enactment

Governing board public hearing always required

Two published notices required

- First notice at least 10, not more than 25 days prior to hearing
- Second notice in separate week

Process for Enactment

Additional rules for zoning amendments

Statutes require:

- Planning board review and written comment
- Additional notice of hearing on rezonings: mailed and posted, actual notice to owner if initiated by other
- Statement on plan consistency and rationale
- Protest petition can trigger $\frac{3}{4}$ majority for rezonings in cities

Process for Enforcement

- Less detailed statutory framework than for enactment
 - More specific for unsafe buildings and residences unfit for habitation
- Vast majority handled administratively
- Statutory options if not resolved:
 - Civil penalties
 - Injunctive relief if ordered by court
 - Criminal citation -- misdemeanor

Process for Enforcement

- Initial determination by local staff
 - Most investigations are complaint driven
 - Many have oral/informal first step
 - Written notice of violation initiates formal enforcement
- Appeal to board of adjustment
 - Evidentiary hearing with full due process
 - Written findings and decision
- Appeal to superior court

2. Vested Rights

Vested Rights

- General rule
 - regulations apply equally to all properties
 - No right that generally applicable regulations will remain unchanged
- Balancing interests
 - Uniform rules
 - Good faith investments in property development

Vested Rights

The right to continue a use or complete a project as it was approved, despite subsequent changes to the ordinance.

Four Paths to Vested Rights

- Common Law
- Valid Building Permits
- Development Agreements
- Site-Specific Development Plans and Phased Development Plans

Common Law Vested Right

- Obtain a valid governmental approval
- Reasonably rely upon the approval
- Make a substantial expenditure
- Act in good faith
- Experience detriment to comply

Valid Building Permit

- As approved in building permit
- Only while building permit is valid
- 6 months to start construction

Development Agreements

- Nature and phasing of the development work
- Public and private investments
- Large-scale projects
- Creates long-term vested rights in the zoning rules in effect at the time of the agreement (up to twenty years)

Site Specific Development Plans

- Approved application for development approval
- Examples
 - planned unit development plan
 - subdivision plat
 - conditional or special use permit
- Local ordinance states what is a specific plan

Phased Development Plans

- Has less detail than a specific plan and developer may give more details in future
- Vesting may be limited to zoning classification
- Vesting for phased plans is optional

Site Specific and Phased Plans

- Determined by local ordinance
- Two to five years
- Public notice and hearing
- Document identified at the time of approval

Some Rules Still Apply

- Conditions of the approval
- Overlay requirements not affecting the type and intensity of use
- Ordinances of general application

Revoking Specific and Phased Plans

- a serious threat to public health, safety, and welfare
- compensation to the owner for costs incurred after development approval
- misrepresentation by the owner
- enactment of state or federal law that prevents the development as approved

Four Paths to Vested Rights

- Common Law
- Valid Building Permits
- Development Agreements
- Site-Specific Development Plans and Phased Development Plans

3. Development Exactions

Developer Exactions



- Exaction: a condition of development approval that developer provide for a public facility at developer's own expense
- Exactions shift costs away from general public to developers/lot purchasers

Exactions and Land Subdivision



- Exactions first authorized for local governments in connection with subdivision plat approval
- Exactions thus more prominent for residential development proposals
- More recently exactions used for commercial and nonresidential development

Government Authority: By Regulation or By Contract?

- Exactions are obligatory requirements that impose measures that may be involuntary as far as developer is concerned
- Infrastructure/development agreements based more on voluntary arrangements that depend on leverage of each party

In-Kind Exactions: The Dedication of Land



- Dedication: offering an interest in land to the public for public use and maintenance
- A city/ county may require subdivider to dedicate land for:
 - Street, utility, and recreation purposes
- Dedication may be accepted by public agency if property as improved meets agency standards

In-Kind Exactions: Public Improvements



- A city or county may require subdivider to provide “community service facilities”
- Facilities may include, but are not limited to, streets, water and sewer lines, storm-water improvements, recreational facilities

Monetary Exactions: Fees in Lieu



- A city/county may charge a subdivider fees in lieu of
 - The dedication of recreation land, and
 - The construction of road improvements

Monetary Exactions: Impact Fees



- Easier to apportion than in-kind exactions
- Facilities may be area-wide rather than local
- General enabling authority only for public enterprises

Exactions and the Law

- Reasonably specific state enabling legislation essential
- In order to avoid an unconstitutional taking, exaction
 - Must have essential nexus (connection) to and be proportional to development's impact
 - Requires determination by government that exaction is valid in specific instance
 - Does not require precise calculation of proportionality
 - Must be justified by government, which bears burden of proving validity

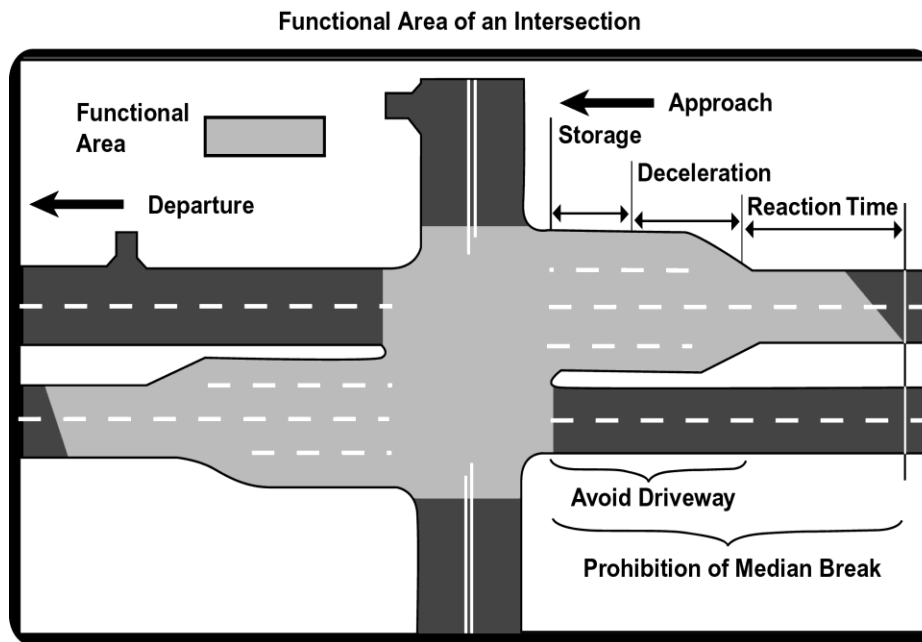


Development Permission: Driveway Permits



- Permit jurisdiction:
 - A city inside its limits
 - NCDOT for driveways connecting to state highways with over 4,000 vehicles/day
- City or NCDOT may require as permit condition
 - Right-of-way dedication,
 - Construction of medians, acceleration/deceleration lanes, and traffic storage lanes

Development Permission: Driveway Permits



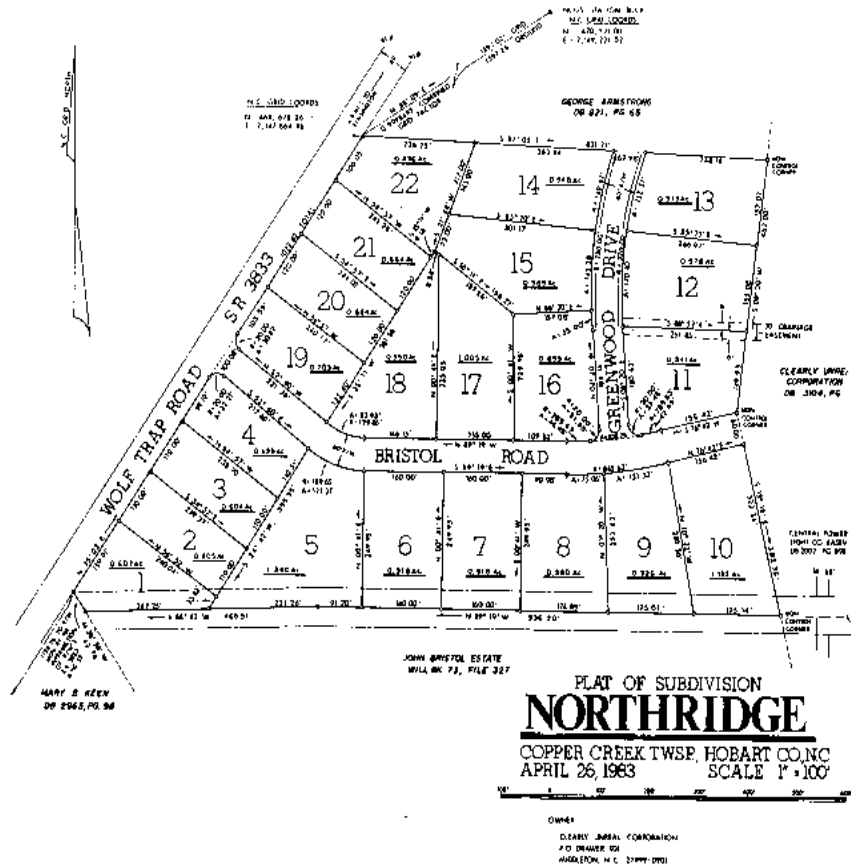
- Exaction requirements valid only if
 - Need for improvements attributable to the traffic using the driveway
 - Improvements serve the traffic of the driveway

Development Permission: Driveway Permits



Also, NCDOT must be allowed to evaluate and recommend driveway access points for new or expanded public/private schools

Development Permission: Subdivision Plat Approval



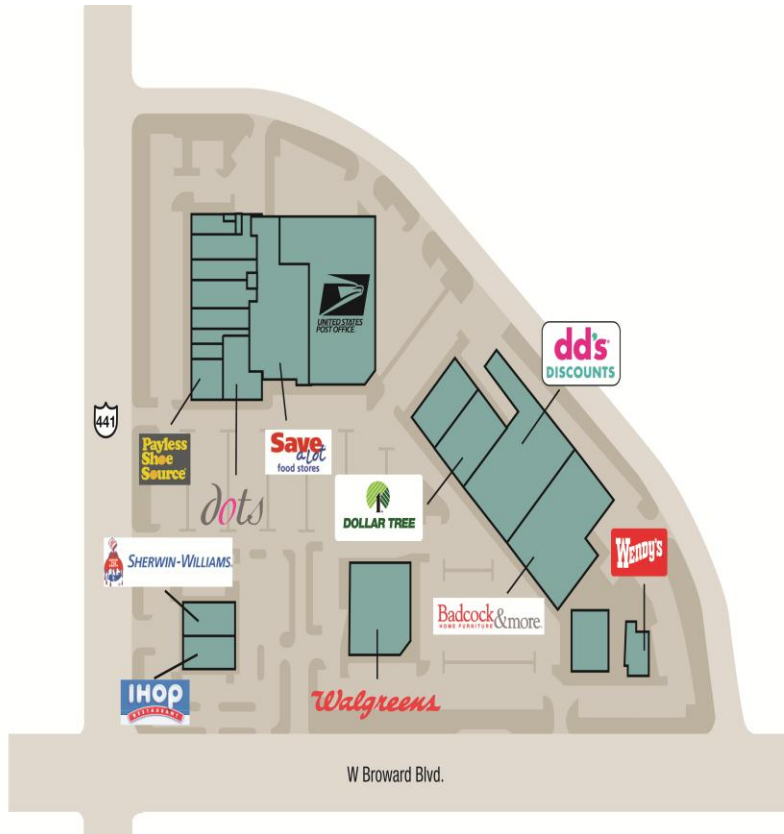
- A city/ county may require subdivider to
 - Dedicate land for street, utility, and recreation purposes
 - Provide “community service facilities”
 - Pay fees in lieu of
 - The dedication of recreation land
 - The construction of road improvements

Development Permission: Zoning Conditional Use Permit



- Site-specific development conditions for conditional-use permit may include requirements that applicant
 - Dedicate street or utility rights-of-way
 - Provide recreational space and facilities

Development Permission: Conditional Zoning



- No conditional-use permit or special-use permit involved
- Petitioner and local government must agree to all site conditions
- However, conditions limited to those addressing conformance of development to ordinance and official plans and those **“that address the impacts reasonably expected to be generated by the development or use of the site.”**

Related Forms of Property Owner Participation

- Formal development agreements
- Ad hoc infrastructure agreements

Adequate Public School Facilities Programs



- Growth management tool
 - Gears pace of community growth to adequacy of public facilities
 - Encourages growth in areas best served by public facilities
- Residential development is approved only if school capacity
 - Is currently available OR
 - Will be available when project ready for occupancy

Possible Developer Options if Facility Capacity Inadequate



- “Voluntary Mitigation Measures”
 - Wait
 - Scale back
 - Phase development
 - “Advance capacity”
 - Offer cash
 - Donate land
 - Construct improvements

Public School APF Program with These Mitigation Measures Invalid



- Union Land Owners and Lanvale cases hold that counties lack authority to establish public school APF programs that involve these mitigation measures

4. Extraterritorial Planning Jurisdiction

History

- 1923--Municipal zoning first authorized
- 1927--Municipal review of plats: one mile outside
- 1955--Municipal subdivision regulation: one mile outside
- 1959--Zoning for cities over 2,500: one mile
- 1969--Municipal building code enforcement: one mile if county refuses to enforce
- 1971--Extraterritorial planning legislation adopted for all planning powers

Current Jurisdictional Arrangements Based on the Following

- Counties should be authorized to exercise most of the powers available to cities
- The territories subject to city and county jurisdiction respectively should not overlap
- A city should be able to plan and regulate development outside city limits if a county has not established certain features of a planning program of its own
- The territorial area within which a city or county exercises its planning powers should generally be the same for each power.

Municipal ETPJ Planning Powers

- Land subdivision control
- Zoning
- Building code enforcement
- Community development
- Historic preservation
- Housing code enforcement
- Open space acquisition
- Community appearance
- Flood hazard protection
- Soil erosion and sedimentation control

Other Jurisdictional Arrangements

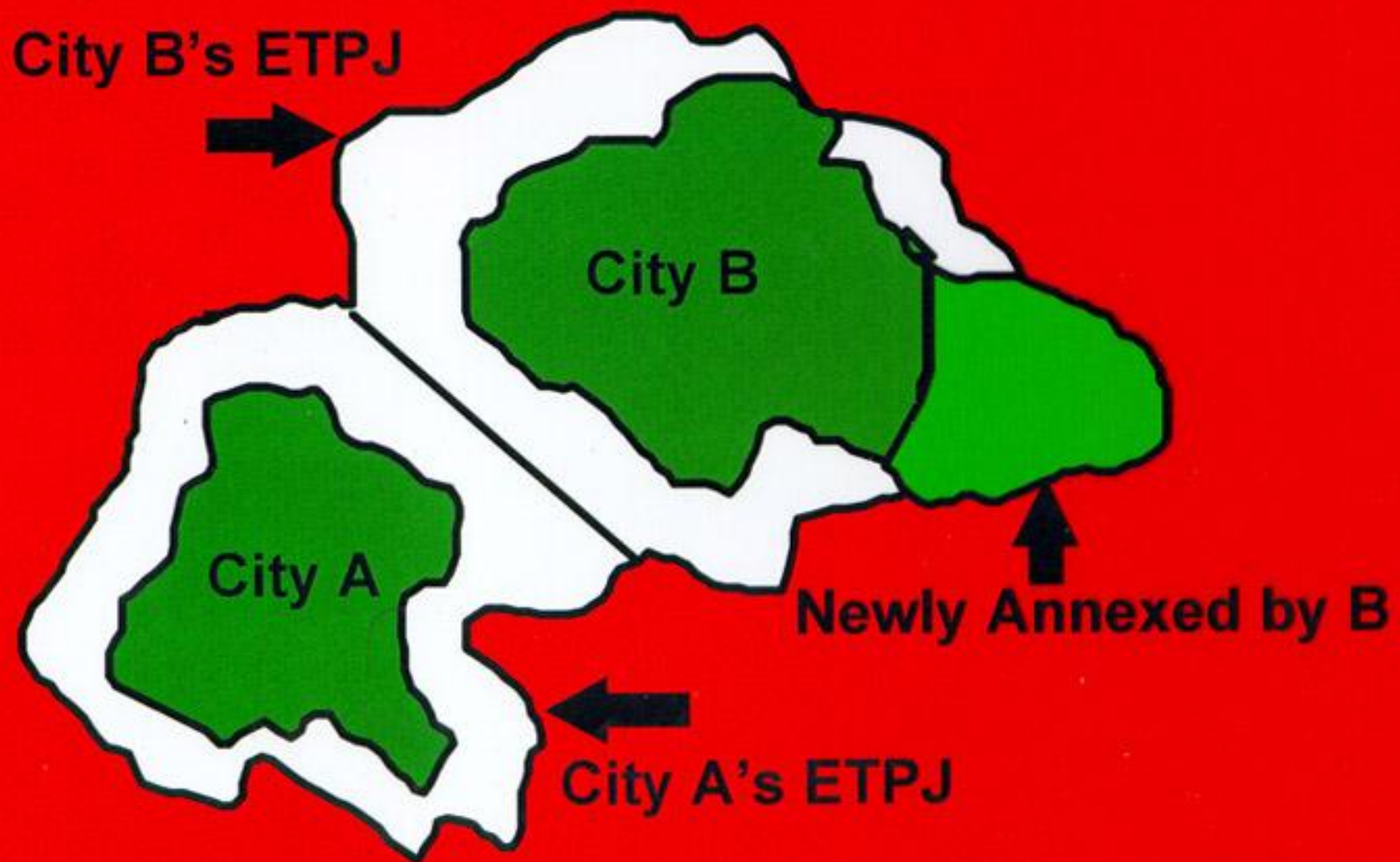
- Police power ordinances
 - City: inside city limits
 - County: outside city limits
- Public enterprises
 - City: outside city limits within “reasonable limitations”
 - County: inside and outside the county
- Economic development activities
 - City: anywhere in county
 - County: anywhere in county

Municipal ETPJ

Without County Approval

- City of any size eligible
- ETPJ up to one mile if county not enforcing
 - Land subdivision ordinance
 - Zoning
 - State Building Code
- City may not exercise power in ETPJ that is not exercised inside city

County Planning Jurisdiction



Municipal ETPJ With County Approval

- County commissioners must approve
- Eligible cities
 - Population over 10,000, up to two miles
 - Population over 25,000, up to three miles

County Planning Jurisdiction with Municipal Approval

- City may request county to take over full jurisdiction
 - Within city's ETPJ
 - Within city limits
- City may request county to exercise particular power
 - Within city's ETPJ
 - Within city's limits

Municipal Planning Jurisdiction with Approval of Another Municipality

- Cities may split overlapping ETPJ area equally
- Cities may agree to another boundary within area of overlap

Other Requirements

- Municipal ETPJ based on
 - Projected urban development
 - Areas of critical concern
 - Geographic features on the ground “to the extent feasible”
- Municipality must adopt extraterritorial boundary ordinance
 - May be combined with ordinance amending zoning map
 - Public hearing required for boundary ordinance; land owners notified by mail
 - Must indicate what properties included

Legal Aspects of Extraterritorial Jurisdiction

- Cities may exercise extraterritorial jurisdiction only with express statutory authority
- North Carolina Supreme Court has upheld constitutionality of extraterritorial land-use regulation
- U.S. Supreme Court has upheld constitutionality of an extraterritorial police, sanitary, and business licensing arrangements

Representation of Extraterritorial Residents on Town Boards

- Required on BOA and PB if city enforces zoning and land subdivision ordinances in ETPJ
- City ordinance determines number of board members and whether “outside” members have same voting privileges as “inside”
- EPTJ representation on city boards must be proportionate to relative population
- If county fails to make appointments, town may do so

County's Role in Extraterritorial Appointments

- Appointments made by county commissioners upon town's request
- If ETPJ extended, county holds hearing to make appointments, selects those who apply at or before meeting
- If county fails to make appointments, town may do so

Other Issues

- Does a town/ county have the staff to administer a planning program in the ETPJ?
- If not, can it contract with another local government to administer its program?
- Does the town/county have plans to annex or extend utilities into the ETPJ area?
- How does planning jurisdiction affect town-county relations generally?

5. Appearance Standards

Appearance Standards: Outline

- Types of Appearance Standards
 - Case Law
 - Statutory Authority
 - House Bill 150

Appearance Elements

- Placement and Function
 - Setbacks
 - Orientation
 - Coverage of the lot
 - Windows and doors
- Size and Shape
 - Height and width
 - Massing
 - Roof slope
- Relation to Context
 - Accessory structures
 - Landscaping and screening
 - Congruency to district
- Materials and Styles
 - Siding materials and colors
 - Architectural style
 - Ornamentation

Appearance Context

- Where
 - central business districts
 - commercial development
 - existing residential neighborhoods
 - new residential neighborhoods
 - important entry corridors
- Why
 - Compatibility of diverse uses
 - Accommodating density
 - Maintaining context and character
 - Maintaining property value

2012 Survey of NC Local Gov'ts

2012 School of Government Survey

- 42%: some mandatory design standards
- 15%: design standards for single family res.

Single family residences not in historic districts,
less than 10% regulated style elements like
cladding, color, or architectural style

Case law on Regulation of Aesthetics

- Pre-1972: must substantially relate to public health, safety or general welfare; not aesthetics alone
- 1979 “the police power encompasses the right to control the exterior appearance of private property” for historic preservation
- 1982 police power includes reasonable regulation of aesthetics (balancing test)
- Confirmed by federal courts

Statutes: Purposes of Zoning

“The regulations shall be made with reasonable consideration, among other things, as to the ***character of the district*** and its peculiar suitability for particular uses, and with a view to ***conserving the value of buildings*** and encouraging the most appropriate use of land throughout such city.” (§160A-383)

Statutes: Grant of Zoning Authority

- height, number of stories and size of buildings,
- the percentage of lots that may be occupied,
- the size of yards, courts and other open spaces,
- the density of population,
- the location and use of buildings, structures and land.

(§160A-381)

Statutes: Authority for Zoning Districts

“regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land.” (§160A-382)

Statutes:

Community Appearance Commissions

- To “enhance and improve the visual quality and aesthetic characteristics of the municipality or county.”
- Authorized to recommend ordinances that will “serve to enhance the appearance of the municipality and its surrounding areas.”

(160A-452)

Statutes: Specific Topics

- Manufactured Homes (160A-383)
 - “may adopt and enforce appearance and dimensional criteria for manufactured homes”
- Historic Preservation (160A-400.1)
 - Certificates of appropriateness to confirm that exterior changes are congruent with the special character of the historic district or landmark
- Conditional Approvals (160A-382)
 - Conformity with adopted plans and to address impacts of the project

House Bill 150

Zoning and related ordinances may not regulate ***building design elements*** for certain residential structures

House Bill 150

- “Building Design Elements” are
 - exterior building color
 - type or style of exterior cladding material
 - style or materials of roof structures or porches
 - exterior nonstructural architectural ornamentation
 - location or architectural styling of windows and doors, including garage doors;
 - the number and types of rooms; and the interior layout of rooms

House Bill 150

- “Building Design Elements” are NOT
 - height, bulk, orientation or location of a structure on a zoning lot;
 - the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors;
 - regulations adopted pursuant to this Article governing the permitted uses of land or structures

House Bill 150

- Applies to structures subject to the NC Residential Code for One- and Two-Family Dwellings
 - Single Family Homes
 - Duplexes
 - Townhomes
 - Accessory Structures

House Bill 150

- Does not apply to:
 - Local or national register historic districts
 - Regulation related to building safety codes
 - Conditions of participation in the National Flood Insurance Program
 - Manufactured housing
 - Special/Conditional Use Permit or Conditional Zoning, if voluntarily consented by the owners
 - Private covenants

House Bill 150

Question of Definitions

- “Dwelling unit” based on bathrooms and kitchens
- Bill prohibits regulation of “the number and types of rooms”
- Unclear impacts for regulating density in single family neighborhoods
- Bill does allow for rules to regulate use of land

Appearance Standards: Outline

- Types of Appearance Standards
- Case Law
- Statutory Authority
- House Bill 150

6. Attorney Fees

Attorney Fees

- General rule – each party pays own attorney fees
- Court can order payment only if statutory authorization

Attorney Fees

Authorizations:

- Frivolous claims
- City or county acts outside its statutory authority (mandated if abuse of discretion)
- Enforcement of specified laws
 - Nuisance abatement, fair housing, public records, open meetings
- Federal constitutional violation established